IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/06/2003

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THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.186 of 2001

Wilbert Appusamy Anthony Bendict .. Appellant

-Vs-

State: through
The Asst. Commissioner of Customs
Prosecution Unit, Chennai Airport,
Customs House, Chennai 1. .. Respondent

This criminal appeal is preferred under S.374 of The Code of Criminal Procedure against the judgment passed in C.C.No.145 of 1997 dated 3 0.10.2000 by the Additional Special Judge for NDPS Act, Madras.

!For Appellant : Mr.R.K.Paul Kanagaraj

^For Respondent : Mr.P.N.Prakash
Special Public Prosecutor

:JUDGMENT

This is an appeal by the appellant/accused against the judgment of the learned Additional Special Judge for NDPS Act, Madras, made in CC No.145/97 under which the accused was convicted under S.8(c) r/w 21 of N.D.P.S. Act and sentenced to undergo R.I. for 10 years and also to pay a fine of Rs.1.00 lakh, in default of which to undergo RI for 6 months.
2. The gist of the prosecution case can be stated as under:
The appellant/accused who was bound for Colombo by Airlanka Flight on 10.6.97 was intercepted at about 9 P.M. at the Anna International Terminal, International Airport, Chennai by a Customs Officer. His baggage was checked in the presence of the witnesses. The baggage was found to contain 3080.91 grams of heroin in three packets. They were seized under a mahazar in the presence of the witnesses. The appellant/accused gave a voluntary statement. He has also stated about the involvement of the second accused. On 12.6.97, the second accused gave a voluntary statement admitting his knowledge about the fact of handing over the seized contraband to the first accused and his role in the conspiracy. Samples were drawn from t he seized contraband and sent for chemical analysis through the concerned Magistrate's Court. The report of the Analyst confirmed the presence of Discetyle morphine which is heroin. In pursuance of the criminal conspiracy entered into by A-1 and A-2 and some other persons, A-1 transported 3 packets of heroin concealed in the

cardboard box from Hotel Sri Ram Nallamani at Egmore to Anna International Airport. A complaint was filed against the accused for the offence under S.8(c) r/w Ss 29 and 21 of NDPS Act.

3. In order to prove its case, the prosecution has examined 10 witnesses and marked 29 exhibits and 13 material objects. After the evidence of the prosecution was over, the appellant/accused was questioned under S.313 of Cr.P.C. as to the incriminating circumstances in the evidence of the prosecution witnesses, and the accused has denied the same as false. No defence witness was examined. After hearing the rival submissions and scrutiny of the available materials, the lower Court has found the appellant guilty under S.8(c) r/w 21 of NDPS Act, convicted and awarded the sentence as state d supra. Aggrieved appellant/accused has brought forth this appeal.

4. Arguing for the appellant, the learned Counsel would submit that the prosecution has not strictly followed the mandatory provisions under Ss 42(1), 42(2) and 50 of the N.D.P.S. Act, and in view of the same, the lower Court should have rejected the prosecution case; that according to the evidence of P.W.1, based on intelligence, the appellant was intercepted that he was smuggling narcotic drugs, but the Officer did not record the message gathered or the reasonable belief, which the Officer had before intercepting the appellant; that according to the provisions of the Act and the rulings of the Apex Court, when an Officer was acting on information or on reasonable belief, he can proceed only after recording into writing; t hat in the present case, the non-recording of the intelligence gathered or the reasonable belief would be fatal to the prosecution, and thus, there was no compliance of the mandatory provisions of S.42(1) of the Act; that the Seizure Officer started to do an act after sunset, and hence, he ought to have informed the intelligence gathered or the reasonable belief to his immediate superior Official, and in the present case, the Officer has not done so, and thus, there was violation of S.42(2) of the Act; that the accused was not informed about his right to be taken to the nearest Magistrate or the gazetted Officer for effecting the search especially when the Officer was acting on the basis of the specific intelligence and on reasonable belief; that the Officer had specified intelligence that the appellant was going to smuggle narcotic drugs, but he did not have the specified intelligence, as he has to how the appellant smuggling the contraband whether secreted in his person or in his luggage, and under such circumstances, he should have informed the right of the appellant guaranteed under S.50(1) of the Act; that it is pertinent to point out that the appellant was accompanied by one Pratap Kumar, but he was allowed to go at the Airport itself by the Officer, after recording his statement; that the law would require that the person accompanied the appellant should have also been arrested and remanded to custody, but for the reasons best known to the Officials, he was set at liberty; that there was no link established between the appellant and the seized cardboard box; that the two luggage bags and the claim bag were not the proof to link the appellant with the seized contraband as the bag was easily available, and under such circumstances, the lower court should have acquitted the accused, and hence, the appeal has got to be allowed. In support of his contentions, the learned Counsel relied on a decision of the Supreme Court reported in 2002(2) CRIMES 375 (BECKODAN ABDUL RAHIMAN VS. STATE OF KERALA).

5. Countering to the above contentions, the learned Special Public Prosecutor Mr.P.N.Prakash would submit that the Officials of the Department on

intelligence intercepted the appellant/accused at 9.00 P.M. at Anna International Airport; that the appellant was bound for Colombo by Airlanka Flight; that when his baggages were checked by the Customs Officials in the presence of the witnesses, 3 kilos of heroin in three packets were found, which was seized under a mahazar in the presence of the witnesses at the spot; that the appellant/first accused has given a detailed statement voluntarily; that a reading of the statement itself would clearly indicate his nexus to the crime in question, and thus, the prosecution has proved the illegal possession of the narcotic substance by the appellant at the time of the search; that from the statement it was found that he along with the second accused hatched up a criminal conspiracy, pursuant to which he was attempting to transport the same; that on the information given by the first accused, the second accused was arrested, and he absconded from appearing before the Court when bail was granted, and in such circumstances, the case was split up and was proceeded against the appellant; that it is true that one Pratap Kumar accompanied the appellant/ accused and a statement was recorded from him, from which nothing could be inferred that he had got any knowledge about the same, and apart from that, even the appellant/A-1 in his elaborate statement has not uttered anything that the said Pratap Kumar had got any knowledge as to the contraband in question, and thus, it was very clear that he had nothing to do with the alleged offence and the Officials satisfied that he had no involvement in the offence in question, and hence, he was set at liberty, and therefore, the appellant should not be permitted to take advantage of the said fact in answer to the crime in question; that when the appellant was found in unlawful possession of the contraband, the presumption has got to be drawn unless it is proved otherwise by the appellant, which he has failed to do so; that in the instant case neither S.42 nor S.50 of the Act is applicable, since the search was taken place in a public place as one in the instant case namely the Airport; that when no search or seizure was conducted on the person of the appellant, the provisions of S.50 of the Act were held to be inapplicable, and hence, the lower Court was perfectly correct in convicting the accused, and the appeal has to be dismissed. In support of his contentions, the learned Special Public Prosecutor relied on a decision of the Apex Court reported in (2002)8 SCC 7 (NARAYANASWAMY RAVISHANKAR VS. ASST. DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE).

6. After careful consideration of the rival submissions and scrutiny of the available materials, the Court is of the firm view that there is no substance in this appeal.

7. Admittedly, the first accused in the case, who is the appellant herein, was bound for Colombo in a Airlanka flight on 10.6.1997 and was intercepted at 9 P.M. at the Anna International Airport. From the evidence of P.W.1 Sundara Rajan, it would be clear that when his baggage was checked on intelligence, the same was found to contain 3 kilos of heroin in three packets, which were recovered under a mahazar in the presence of the witnesses. The tags in the luggages tallied with the claim tags of the accused. The recovery mahazar prepared at the spot marked as Ex.P10 was signed by the accused, P.W.1 and both the witnesses along with the superior Officer. The seized contraband was handed over to the superior Officer, and the same was produced before the concerned Judicial Magistrate on 12.6.1997. Ex.P14 requisition was forwarded to the concerned Magistrate's Court for chemical analysis of the samples. Accordingly, the samples were tested by

P.W.4 Vatsala Venkatesan, Chemical Examiner, Customs House, and on analysis it was found to contain diacetyl morphine, which was heroin. The Analyst's report is marked as Ex.P21. The appellant has given a detailed statement, which was recorded. A close scrutiny of the statement made by the appellant would narrate the sequence of events and in particular the nexus of the appellant to the crime, and thus, the prosecution beyond reasonable doubt has proved that the accused was in possession of the narcotic substance weighing 3 kilos at the time of the inspection and search. 8. As rightly pointed out by the learned Special Public Prosecutor that the second accused on the information of the appellant was arrested, remanded to judicial custody, and he was also arrayed as an accused, and since he absconded during the currency of the bail, the case was split up and proceeded against this appellant. The Court is unable to notice any infirmity or illegality in the Officials setting one Pratap Kumar, who accompanied the appellant, at liberty, since either from his statement or from the statement recorded from the appellant/A-1, nothing could be spelt that the said Pratap Kumar had played any role in the alleged offence or that he had got any knowledge of the conspiracy between A-1 and A-2 or the attempted transmit or possession of the contraband by A-1.

9. The contention of the appellant's side that the authorities have not strictly complied with the mandatory provisions under S.42 of the Act cannot be countenanced for the simple reason that in the instant case, the search was made and the seizure of the contraband has been effected in the Airport which is a public place. In such circumstances, the mandatory provision under S.42 of the N.D.P.S. Act does not come into play. Hence, the non-compliance of the provision of S.42 of the Act in the instant case, was only irrelevant under the present circumstances of the case.

10. It has been held by the Apex Court in a case reported in (1999) 8 SUPREME COURT CASES 257 (KALEMA TUMBA VS. STATE OF MAHARASHTRA AND ANOTHER) thus:

"Only when the person of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person"".

In the instant case, it has been by sufficient evidence proved that the baggage that was carried by the appellant/A-1 was searched, and hence, the contention of the appellant's side that the Officer should have informed the right of the appellant guaranteed under S.50(1) of the Act cannot be accepted.

11. In view of the above reasons, it has to be held that the trial Court was perfectly correct in convicting the appellant/accused and sentencing him to undergo imprisonment as stated above. Regarding the default sentence awarded by the trial Court, the Court is of the view that it has got to be reduced.

12. Therefore, the default sentence of six months R.I. is modified, and in default of payment of fine awarded by the lower Court, the appellant/accused shall undergo R.I. for two months. With this modification, this criminal appeal is dismissed.

Index: Yes

Internet: Yes

To:

1) The Additional Special Judge for NDPS Act, Chennai.
2) The Additional Special Judge for NDPS Act, Chennai,
Thro' The Special Principal Judge for NDPS Act, Chennai.
3) The Superintendent, Central Prison, Vellore.
4) The Special Public Prosecutor for NDPS, Madras.
5) The Asst. Commissioner of Customs, Prosecution Unit,
Chennai Airport, Customs House, Chennai 1.